



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Outagamie County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206511

Pursuant to petition filed October 7, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Outagamie County Department of Human Services ("the agency") to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, December 6, 2022 at 11:30 AM via teleconference initiated from Madison, Wisconsin.

The hearing was first scheduled to occur on November 17, 2022 at 11:00AM. At that time, the undersigned administrative law judge (ALJ) called the respondent to initiate the hearing. Prior to going on the record, Respondent advised the ALJ that she intended to sign a waiver of her right to a hearing but that she needed a waiver form to sign. The agency worker agreed to send a waiver form to the respondent. The hearing was however rescheduled to December 6, 2022 to allow Respondent time to receive and return the waiver form and in the event that Respondent changed her mind or otherwise failed to submit the waiver form. Respondent did not ultimately submit a waiver form.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Outagamie County Department of Human Services
320 S Walnut St
Appleton, WI 54911-5985
By: Alicia Grube

Respondent:

██████████
████████████████████
████████████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Outagamie County who received FS benefits from at least October 2018 through December 2021.
2. The agency mailed Respondent “Enrollment and Benefits” booklets in 2019, 2020, and 2021. That booklet includes a description of FS recipient rights and responsibilities and information regarding the penalty for committing “FoodShare fraud”. The booklet also includes specific examples of behavior that may be considered fraudulent including the following: “Shelly is low on money; she is currently getting FoodShare benefits but has already spent her benefits for the month. Shelly offers her sister, Judy, money in exchange for her FoodShare benefits. Judy agrees and takes Shelly grocery shopping with Judy’s QUEST card.”
3. On July 22, 2022, Respondent paid \$100 to [REDACTED] in exchange for \$200 worth of food that [REDACTED] purchased using FS benefits that had been issued to a third party ([REDACTED]).
4. On July 22, 2022, Respondent knew that [REDACTED] used FS benefits to purchase the food that she paid [REDACTED] for and she knew that doing so violated FS program rules.
5. On August 29, 2022, Agency Representative Alicia Grube spoke with Respondent by telephone. At that time, Respondent admitted to buying food from a third party despite knowing that food had been purchased with FS benefits issued to someone else and despite knowing that doing so was “wrong.”
6. On October 10, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent gave “cash to an individual to receive food purchased from another person’s foodshare benefits not for [Respondent’s] household.”. The hearing notice stated that a hearing would take place on November 17, 2022 by telephone.
7. On November 17, 2022, the ALJ reached Respondent by telephone. At that time, Respondent stated that she wanted to sign a waiver of her right to a hearing and that she “fully admits what I did.”
8. On November 17, 2022, the Division of Hearings and Appeals sent a hearing notice to Respondent advising her that a hearing had been rescheduled for December 6, 2022 at 11:30 and that it would take place by telephone.
9. Respondent never submitted a signed waiver and did not appear at the scheduled December 6, 2022 Intentional Program Violation (IPV) hearing.
10. As of the date of the decision in this matter, she had not contacted the Division of Hearings and Appeals to assert that she had good cause for failing to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that Respondent paid \$100 for \$200 worth of food to an individual who purchased that food using FoodShare benefits that had been issued to a third party. The agency representative who appeared at hearing helped to conduct the fraud investigation in this case and credibly testified that during a telephone interview on August 29, 2022, Respondent admitted to making the purchase described above and that she also admitted to understanding her actions were “wrong.” The agency further contended that Respondent’s action was a violation of state law which prohibits an individual from “purchas[ing], for cash or other consideration that is not food, food that was previously purchased from a supplier using [FoodShare] program benefits.” Wis. Stat. §946.92(1)(dm)5, (2).

Based on the agency representative’s credible testimony regarding Respondent’s admission to her and the supporting documentary evidence offered by the agency, the agency has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

- The respondent violated, and intended to violate Wisconsin law that prohibits using cash to obtain goods that were purchased from a supplier with FS benefits. See Wis. Stat. §946.92(1)(dm)5 and (2).
- 1. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner’s determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

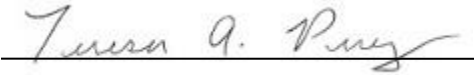
In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

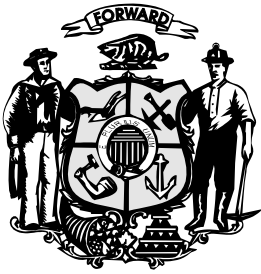
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 26th day of January, 2023

A handwritten signature in dark ink, appearing to read "Teresa A. Perez", is written over a horizontal line.

\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

- c: East Central IM Partnership - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Alicia Grube - email



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The preceding decision was sent to the following parties on January 26, 2023.

Outagamie County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]